

CARDOZO'S PHILOSOPHY OF LAW

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Benjamin Nathan Cardozo's contributions to the juristic culture of his time are not confined to the doctrinal illuminations and improvements which are to be found in his judicial opinions. He was a great judge; he was also a philosopher of law. How great a philosopher of law is a question that is, perhaps, premature to ask or to attempt to answer. Philosophy is a long-range look at life, and its standards of value do not accept as final the verdict of a man's contemporaries. Yet many other questions about Cardozo as a philosopher of law are of concern to the generation or two immediately following his death. What were his general theories of law? What was his conception of the nature of law? What new insight did he give into the judicial function and the judicial process of deciding cases? What were his ideas about theories of values? What were his views upon those relations of law to the cosmos which may be called the metaphysics of law? Wherein, in all this, did he derive from his predecessors and differ with his contemporaries? The present article essays a discussion of these questions.

A judge may be known as a philosopher of law by the wisdom and insight which he displays in his practical judgments. His philosophy of law may be adumbrated in his opinions on contracts or torts or constitutional law. These divinations may be of great importance for legal development, yet they are, due to the limitations of the judicial opinion, either implicit or at most fragmentarily explicit. Cardozo's philosophy of law is partly to be derived from his judicial opinions. Fortunately, he has given in his books, articles and addresses more coherent and studied statements of his ideas. These were analytic in detail but were never systematically articulated. His deepest insights came from his passion for justice, and were expressed in the language of the poet rather than the logician. It is doubtful if he would have found congenial the formulation of complete and exclusive categories, the elaboration of a system of philosophy of law. The practical work of the court was the starting point of his reflections, and he was never long separated from the earth which gave him strength. He

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did not succumb to what Professor Whitehead has called the philosopher's disease, the itch to put everything in terms of a major premise of a syllogism.¹ Indeed, it is doubtful if Cardozo considered himself to be a philosopher of law. He seems to regard himself as an observer of the passing scene, or a thirsty student who delights to drink from the springs of juristic and cosmic ideas. For these reasons the attempt in the present article to present a partial summary and analysis of his philosophy of law involves many difficulties of interpretation and reconciliation.

His eclecticism is revealed in the freedom with which he relied upon the ideas of his predecessors and his contemporaries. These affinities and resemblances of ideas so pervade his writings that their interpretation eludes the apparatus of citation and footnote. His unflinching nobility of thought reminds one of Plato, as does his persistent striving to find beneath the social flux the realities of social justice. His search for principles of value behind precedents resembles the age-long search for natural law. Yet his reality and his natural law are not eternal, immutable formulas. His writings assume a belief in human progress which is typical of American idealism. His respect for the moral traditions of a people is akin to Savigny's, but is strongly influenced by Holmes' view that continuity with the past is only a necessity. In his quick and righteous indignation at those who act from impure motives, he shows sometimes the Puritanical sternness of Kant, at other times the more humane idealism of Stammler. This is, perhaps, his dominant thought. Yet in his insistence upon the appraisal of legal rules and legal institutions in terms of their social consequences he carries forward the utilitarianism of Jeremy Bentham and the sociological jurisprudence of Holmes and Dean Pound. Finally, in his avowed and often exemplified distrust of conventional formulas and in his insistence that the rule must fit the case and not the case the rule, he shows that faith in the power of reflective problem-solving, as an interplay of data and ideas, which is typical of the thought of John Dewey. Cardozo's philosophy of law is thus representative of the best that has contributed to the American intellectual tradition.

A critical analysis of Cardozo's philosophic thought is eluded at the outset by his exquisite style. It is so much easier to quote from Cardozo than to give one's own clumsy paraphrase, that one is tempted to summarize his ideas by a selection of quotations. His sentences and his diction are finely wrought, sometimes to the point of fine writing. Yet his language conveys intensity of conviction and carries emotional overtones which signify the vitality of his thought. Critical analysis

1. WHITEHEAD, *MODES OF THOUGHT* (1938) 194.

seeks exact meanings; to Cardozo exactness was of only secondary importance. He has told us that there may be more honest truth in an "inspiring generality" than in an arid, if exacter, phrase.² His continued use of metaphors, especially biological metaphors, is baffling. When he says that the law needs "a principle of growth",³ that its formulas are charged with "procreative power",⁴ does he postulate a conception of law as a living organism, and does he regard this postulate as a basis for logical reasoning about law? It seems clear that such was not his intention. His biological metaphors are not sustained through long passages with consistency and detail; he does not scruple to mingle them with metaphors of a mechanical order or of some other order.⁵

"My concern", he says, "is with the relation of philosophy to life."⁶ His mode of expression, like his mode of thought, was deliberately literary rather than mathematical. He chose neither to follow the arid terminology of the older jurisprudence nor to invent novel and forbidding terminology. Whatever may be the value of the latter method for exactness and originality of thought,⁷ it must long remain esoteric. Fortunately Cardozo's influence upon the bench and bar is not hindered by such terminological barriers. His finely wrought style, his profusion of metaphor, was the result of his faith that the judicial opinion, unlike primitive idols, need not be ugly to be revered.⁸ He wanted to create beauty as well as to administer justice, and through both to influence his fellow men.

Another obstacle to critical interpretation of Cardozo is his habit of quoting extensively from the writings of others. No American judge has given evidence of more widespread reading in the classical and modern literature of jurisprudence and philosophy. From Plato and Aristotle to Pound and Dewey, he ranged in his search for the illuminating thought or the inspiring phrase. His interest in philosophers seems sometimes academic, but his ultimate interest was less in the philosophy as a discipline of the schools than in philosophy as

2. CARDOZO, *THE GROWTH OF THE LAW* (1924) 142.

3. *Id.* at 1.

4. Address, 55 REPORTS OF NEW YORK STATE BAR ASS'N 282 (1932): "I have said that I prefer to give the name of law to formulas that are charged with this procreative power—to give it in advance of the hour of their final triumph—though it may turn out in the end that their lives and the lives of their expected progeny are shorter than was hoped for when the horoscope was cast."

5. Thus, continuing the passage quoted *supra* note 4, he says: "If I give them this name, I am merely preserving the analogy between the laws that are the province of jurisprudence and the predictions of orderly succession that are called the laws of nature." Cf. *THE GROWTH OF THE LAW* (1924) 34.

6. *THE GROWTH OF THE LAW* (1924) 22-23.

7. As in WHITEHEAD, *MODES OF THOUGHT* (1938), or his *PROCESS AND REALITY* (1929).

8. CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS* (1931) 1.

a study of life.⁹ His inveterate habit of quotation expressed his genuine humility and his belief that he was a product of the culture of his epoch. His philosophy of law is presented to us in what Professor Whitehead has called the "primary" or "assemblage" stage;¹⁰ he shows us the process of assembling his ideas. It is impossible to reconcile the ideas of all of the writers from whom Cardozo quotes; yet rarely does he dissect out the part which he approves, and rarely does he dissent. He loved peace and reconciliation rather than controversy. In summarizing his own thought, then, one will do well not to rely upon his quotations unless he clearly approves or paraphrases them. Excluding his judicial opinions and one bar association address, his writings lack the sharpness that comes from the clash of controversy.

HIS WRITINGS ON PHILOSOPHY OF LAW

Cardozo's philosophy of law is to be found in his judicial opinions, in his four books,¹¹ and in the memorable bar association address of 1932.¹² The development of his philosophic thought is best presented in the three books which contain his lectures at Yale¹³ and at Columbia.¹⁴ In the first of these, *The Nature of the Judicial Process*, he is striving to explain, as if in a colloquy with himself, the work which he is doing as a judge of the highest court of New York. His revelations of the judge's mental processes were at the time refreshingly novel, even startling. These lectures are, it is submitted, the most philosophically naive and yet the most constructive and vigorous of the three books.¹⁵ Here he gives the four methods of the judicial process.¹⁶ His faith that a path would be found seems stronger at this point than it was later, and he drives on to the goal of judicial freedom of decision with less regard for the niceties of terminology. In the second volume, *The Growth of the Law*, he pursues the same theme, and develops his conceptions of law and logic in a more sophisti-

9. Professor Edman quotes one of his former teachers of philosophy as saying that professors of philosophy study philosophers, while philosophers study life. EDMAN, *PHILOSOPHER'S HOLIDAY* (1938) 33.

10. WHITEHEAD, *op. cit. supra* note 1, at 2.

11. *THE NATURE OF THE JUDICIAL PROCESS* (1921) (hereafter cited as "THE NATURE"); *THE GROWTH OF THE LAW* (1924) (hereinafter cited as "THE GROWTH"); *THE PARADOXES OF LEGAL SCIENCE* (1928) (hereinafter cited as "THE PARADOXES"); *LAW AND LITERATURE AND OTHER ESSAYS* (1931). It is much to be regretted that of these four books, only *THE PARADOXES* is provided with an index.

12. 55 *REPORTS OF NEW YORK STATE BAR ASS'N* 263 (1932) (hereafter cited as "55 *REPORTS*").

13. *THE NATURE; THE GROWTH*.

14. *THE PARADOXES*.

15. That is, a vigorous and constructive philosophy usually violates or ignores the canons of prior philosophic disciplines.

16. To be discussed in Part II of this article.

cated way. This volume gave him an opportunity to praise the work of the American Law Institute, in which he took part,¹⁷ and to look to the Restatement of the law for a lightening of the judge's burdens. In this second volume he also gives his clearest conception of the nature of law.¹⁸ In *The Paradoxes of Legal Science* he ventured further into metaphysics and ethics than he had gone before, grappled with problems of more inclusive scope, and attained a sophistication which somewhat lacked the common touch. As he became more the philosopher, he became less the philosopher of law.

Of these three slender volumes (they make less than 500 pages) it must be noted that they were written to be delivered to an audience (chiefly of lawyers), that Judge Cardozo spoke with reticence about questions that might come before him as a judge,¹⁹ and that they were composed while he was carrying his full share of the work of the New York Court of Appeals. Knowing the incessant labors of that court, and knowing Cardozo's frail physique, we can readily believe that he never had that conjunction of time and energy which would have enabled him to give a full and rounded expression to his philosophic thought. The bar association address of 1932 is important as a restatement, clarification and defense of his juristic philosophy which, hailed as liberal in 1921, had been criticized as conservative in 1931.²⁰ His judicial opinions are illustrations and fragmentary expositions of his philosophic thought. It would be interesting to explore his philosophic development through his judicial opinions, and to try to ascertain whether he adhered as judge to the views which he expressed as a philosopher of law. Such a study is beyond the scope of the present article.

17. In one instance, at least, Judge Cardozo seems to have aided the Restatement. In his statement of the measure of recovery in quasi-contract for services rendered in part performance of a contract where completion of performance had been excused by death, he stated in 1930: "The question to be determined is the benefit to the owner in advancement of the ends to be promoted by the contract." *Matter of Buccini v. Paterno Construction Co.*, 253 N. Y. 256, 259, 170 N. E. 910, 911 (1930). The Restatement of Contracts formulates the measure of recovery as "the benefit derived from the performance in advancing the object of the contract." *RESTATEMENT, CONTRACTS* (1932) § 468 (3).

18. Discussed *infra* p. 76.

19. E. g., *THE NATURE* at 86.

20. The only direct criticism of Cardozo which I have come across, prior to 1932, is FRANK, *LAW AND THE MODERN MIND* (1930). See also, *infra* note 69. The references to Cardozo are for the most part commendatory. See *infra* note 123, Part II. Frank criticized Cardozo because, though aware of the uncertainty of law, he was not complacent about it; he was still "yearning for the absolute". FRANK, *op. cit. supra* at 239, quoting from *THE PARADOXES*, without page citation. See *infra* note 195, Part II. Aside from this direct attack, the extreme position taken by some of the "neo-realists" (the phrase is Dean Pound's) during the 1920's made Cardozo, a radical in 1921, appear conservative in 1931. He suggested this thought in the opening paragraph of the bar association address: "It is time for philosophy to prove that she also can be up to date." 55 *REPORTS* at 264.

HIS CONCEPTION OF LAW

Cardozo's conception of law is, briefly stated, that a law is a normative rule which will probably be recognized as authoritative by a court in making a decision. His primary interest was not in the exploration or formulation of the nature of law, as a dialectic problem, but rather in the derivations and changes of laws, the choices and applications of laws through the judicial process, and the consequences of those applications; yet his conception of law is central and basic for his discussions of these other problems. In relation to the divergent theories of the nature of law which were current during the decade when he was formulating his own views, he displayed a characteristic prudent moderation. A starting point for the stream of juristic speculation about law, in so far as it affects Cardozo, is Holmes' memorable essay of 1896.²¹ Advising a group of law students that the law is not "a deduction from principles of ethics or admitted axioms or what not", Holmes concludes:

"The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."²²

The law is limited to those prophecies which a bad man wants to know about in order to keep out of the clutches of the court; he is not concerned with "moral" principles. There is danger of confounding morality with law.²³ Yet further on, Holmes is concerned with a "rational explanation", "a principle of growth";²⁴ the judges should "recognize their duty of weighing considerations of social advantage",²⁵ should seek to refer each rule contained in the body of law "articulately and definitely to an end which it subserves"; the grounds for desiring that end should be stated, or should be ready to be stated, in words.²⁶ The divergence between these two positions is obvious; and yet they are not formally contradictory. If one asks, formally, "What is law?"—Holmes would reply that it is a prediction of what the courts will do in fact; but in making that prediction considerations of social advantage will be an important factor. So far, Cardozo is

21. Holmes, *The Path of the Law* (1896) 10 HARV. L. REV. 457, reprinted in HOLMES, COLLECTED LEGAL PAPERS (1920) 167, and in part, HALL, READINGS IN JURISPRUDENCE (1938) 670.

22. HOLMES, COLLECTED LEGAL PAPERS (1920) 173. Holmes repeated the prediction theory of law in his article on *Natural Law*, 32 HARV. L. REV. 40, 42 (1918), COLLECTED LEGAL PAPERS (1920) 310, 313. The suggestion has recently been made, by my friend Llewellyn, that Holmes did not repeat the prediction theory.

23. HOLMES, COLLECTED LEGAL PAPERS (1920) 179. Holmes conceived of morals (ethics?) as concerned "with the actual internal state of the individual's mind, what he intends". *Id.* at 177. He thus identifies morals with Kantian ethics, which explains his later acceptance of the teleological social ethics. *Id.* at 184 *et seq.*

24. *Id.* at 179.

25. *Id.* at 184.

26. *Id.* at 186.

not in substantial disagreement, though he shifts the focus from counselor to judge. But when one asks further: "What is the law?", "Where are these predictions to be found, or how are they to be made?", Holmes does not make himself entirely clear.²⁷ Cardozo, with somewhat greater clarity and with somewhat more conservative implications, takes the term "law" to mean the body of rules and principles which a court will probably recognize as authoritative in making its decision.

So much by way of general introduction to the topic. Cardozo's positions with regard to certain questions will serve to clarify his conception of law.

1. *The sanction of law.* A law, to Cardozo, is necessarily a positive law, one which is sanctioned by the force of the state. This position is implicit in his continued preoccupation with the judicial process, and is explicit in several passages.²⁸ He was, too, aware of the varieties of legal sanctions. Denial of recovery in a civil action of contract is a means by which the law "throttles a corrupting tendency".²⁹ Even shifting the burden of proof may be a means of effectuating a nice adjustment of conflicting interests.³⁰ Yet he pays no attention (in his extra-judicial writings) to the sanctions of administrative tribunals and, despite his repeated emphasis upon the law as a means to an end, he never thoroughly explored the varieties of legal sanctions. He did not discuss the effects which legal sanctions have upon human conduct, except as incidental to his theory of the judicial function.³¹ His theory of sanctions was at best fragmentary.

Nor did he deem it necessary to take a position on the controversy, discussed by Gray,³² as to whether law is a command of the state (sovereign). Whether the state "commands" what it permits the judges to decide, and whether or in what sense a permissive rule is sanctioned by the state, were questions at the periphery of his interest. His references to the executive and legislative branches of government are so casual that one can scarcely piece together from them a theory

27. He says: "The number of our predictions when generalized and reduced to a system is not unmanageably large." *Id.* at 169. Apparently, this refers to the rules of law systematically presented; but these rules are not law, they are formally speaking, mere generalizations about laws, which are the predictions themselves. Thus a law appears to be a lawyer's *ad hoc* prediction as to what the law will do about the case of a particular client. Yet Holmes does not stick to this as a formal terminology, for elsewhere he speaks of "a body of law" as something that "contains" rules. The terminological discussion which might be indefinitely prolonged, is of importance because the controversies of the writers relate in part to the appropriate meaning of the word, "law".

28. *THE PARADOXES* at 35, 42, 48.

29. *Union Exchange Nat'l Bank of New York v. Joseph*, 231 N. Y. 250, 254, 131 N. E. 905, 906 (1921). For a fuller discussion of this case, see Part II of this article.

30. *THE NATURE* at 153.

31. To be discussed in Part II of this article.

32. GRAY, *THE NATURE AND SOURCES OF THE LAW* (2d ed. 1921) 83-87.

about the relations of law and the state. His position appears to be not inconsistent with Kelsen's,³³ that there is a hierarchy of delegated authority and that the judges have a modest portion of the authority to pronounce law which will have the sanction of the state.

2. *A law as a generalization.* With none of the doubt or hesitation which he displayed on other questions, Cardozo believed that a law is a generalization which goes beyond the particular case, a proposition which offers a guide for the future. In several passages he rejects the notion that the law consists of "isolated dooms"³⁴ which "spend their force as law when they have composed the controversies that led to them".³⁵ Elsewhere he asks:

"Is there any law beyond the precept of isolated judgments? Must we surrender the quest for the universal, and content ourselves with what is merely a succession of particulars? Back of the changing phenomena are we to posit a substratum which gives coherence and reality?"³⁶

Clearly the answer which he gives to the first and third questions is affirmative, to the second, negative. Yet the questions contain certain ambiguous expressions which are typical of Cardozo's figurative style. An extended exegesis of this passage is justified by its importance for Cardozo's theories of law.

What is the "precept" of an isolated judgment? In law a judgment is an order of the court, for instance, an order that the plaintiff do recover a named sum, and have therefor execution; it is an order confined by its terms to designated parties and a specified subject matter. It does not purport to lay down a general proposition which goes beyond these specific matters.³⁷ As a particular the judgment lacks, or at least does not purport to have, significance for other cases. The first sentence in the above quotation is self-contradictory. "*Isolated judgments*" would not have any precepts; or, if used as a datum of induction, an isolated judgment would have many possible precepts, hence would not have a single exclusive precept ("*the precept*"). The significance of the passage is to be derived not from an exact analysis of its terms but rather from a consideration of its general sense and bearing upon other sets of ideas.

The problem which Cardozo here touches upon is similar to the question whether we can "reason" from particular to particular. John

33. LAUTERPACHT, *KELSEN'S PURE SCIENCE OF LAW*, in *MODERN THEORIES OF LAW* (1933) 105, 114. See also Kelsen, *The Pure Theory of Law* (1935) 51 *LAW QUARTERLY REV.* 517, reprinted in part, HALL, *READINGS IN JURISPRUDENCE* (1938) 653.

34. *THE GROWTH* at 36, 54.

35. *Id.* at 36.

36. *Id.* at 29.

37. Excluding injunctions against unnamed persons designated by class, which, though given by courts, have the aspect of administrative rules.

Stuart Mill, the protagonist of inductive reasoning, insisted that we can and do so reason;³⁸ to which Bradley (and others) have retorted that the reasoning implies a generalization, an implicit major premise, under which both particulars can be subsumed.³⁹ The controversy is, in a sense, terminological: What do we mean by "reason"? Yet it is more than terminological. The differences between what Keyser calls autonomous or empirical thinking and postulational thinking,⁴⁰ involve differences in uses and differences in risks of error. Cardozo's position seems clearly to favor the use of postulational thinking (making the major premise explicit) in law. For this reason he insists that the law is the postulate itself, and not the particular precedent(s) from which the postulate is derived by way of generalization.⁴¹

To Cardozo the questions raised in the passage above quoted⁴² had both metaphysical and ethical implications. The conflict between nominalism and realism was, he suggested, involved in the answer to these questions. In the passage preceding the quotation, he refers to the "chatter of nominalist and realist, waging their never ending war of words",⁴³ and concludes that even law has not been isolated from this controversy, since the choice between nominalism and realism arises when one seeks a definition of law itself; "the ancient factions are before him, already at each other's throats".⁴⁴ This passage, despite its tone of gentle raillery at the pretensions of the controversialists, is one of many which shows Cardozo's interest in exploring the relations between law and philosophy. One may question at the outset whether the controversy has significance for the questions which he asked in the quoted passage. Nominalism is the theory that universals or "Ideas" have no real existence, that there are only particular things and names or symbols which suggest a reference to such things. Realism (i. e., medieval realism) is the theory that concepts or universals do have a real existence, and in Platonic realism the particular things are subordinated to the concepts or universals, which alone have independent existence. The passages from Cardozo above referred to indicate his striving for Platonic essences. The realist-nominalist controversy is scholastic in origin, and modern scholasticism

38. MILL, A SYSTEM OF LOGIC (8th Am. ed. 1884) 142.

39. BRADLEY, PRINCIPLES OF LOGIC (1922) 348-355. On reasoning by analogy, see COHEN AND NAGEL, AN INTRODUCTION TO LOGIC AND SCIENTIFIC METHOD (1936) c. XIV; HALL, READINGS IN JURISPRUDENCE (1938) c. 13.

40. KEYSER, THINKING ABOUT THINKING (1926), especially c. IV. Empirical thinking is not synonymous with autonomous, which is wholly unreflective, but it is intermediate between autonomous and postulational.

41. Frank, on the other hand, would apparently say that the law consists of the particular precedent(s) and the rules of law are generalizations *about* law rather than law. FRANK, *op. cit. supra* note 20, at 276.

42. *Supra* p. 78.

43. THE GROWTH at 28.

44. *Id.* at 28-29.

recognizes an intermediate position, moderate realism, which is the theory that universals do not exist outside of the mind and their exemplifications in particulars.⁴⁵ This intermediate position (which Cardozo neglects to mention) avoids the extreme position that only sensations (or "facts" or "matter") are real, and the other extreme position that only disembodied ideas are real. Since the question is as to the nature of reality, it is a question of metaphysics, in the proper sense of that term.

What significance does this metaphysical question have for the definition of "law"? It is submitted that the question has no necessary significance for a definition of "law", that the propriety or validity of any particular definition of law can be discussed adequately and with greater practical convenience by omitting any reference to the nominalist and realist positions. One can define the law as the authoritative decisions and regard the generalizations as only propositions about law, or one can define the law as generalizations and regard the authoritative decisions as the data or evidence which support the authority of the law and give it meaning, without being necessarily involved in the nominalist-realist controversy. The definition of a particular term can be regarded as a matter of convention and convenience⁴⁶ without incurring the philosopher's epithet, "nominalism", just as one can discuss propositions in logic without taking a position as to their "existence".⁴⁷ A good definition should select the essential or central aspects of the thing defined and should delimit it from other things with which it is likely to be confused. Thus, Holmes chose decision of litigation as the central aspect of law, partly, at least, because it served to distinguish law from vague theories of morals;⁴⁸ yet he had no difficulty in discussing generalizations without referring to their ontological or metaphysical status.

But it is true, nevertheless, that a Platonist would not be likely to see the essence of law in a succession of particular decisions, nor to assign a subordinate role to the "principles" of which these decisions are, in his view, merely exemplifications. Similarly, one who regards "facts", "events" as the genuine realities, of which ideas or generalizations are merely pale summations, is likely to feel more at home among the nominalists, and is more likely to find the essence of law in facts and decisions. If he has also a strong infusion of skepticism about the

45. The three theories are summarized in MARITAIN, *AN INTRODUCTION TO PHILOSOPHY* (1933) 159-161. The summary in the text is intended merely to indicate the sense in which Cardozo probably used the terms "nominalist" and "realist". (In medieval scholasticism there was also an intermediate position known as "conceptualism".)

46. COHEN AND NAGEL, *op. cit. supra* note 39, at 227-229.

47. EATON, *GENERAL LOGIC* (1931) 22-24.

48. HOLMES, *op. cit. supra* note 21, at 169-179.

reliability of broad generalizations, he will be likely to find that the law consists of things done—the extreme “do-law” theory. Thus Cardozo has correctly sensed, in the general aspects of the controversy about the meaning of law, basic differences of view as to the important thing to begin with, which resemble the differences between nominalists and realists. (But which resemble more closely the differences between empiricists and rationalists.) At this point (in the passage quoted) Cardozo is clearly on the side of the angels. The net effect of his juristic writings, however, is to place him in an intermediate position. As will be shown later, he regards law as a generalization which the courts will probably act upon, and thus moves nearer to the “do-law” position.

Cardozo's insistence that law is a generalization was influenced far less by his metaphysical speculations than by his sense of values. His belief that law is, and should be, influenced by ethical or moral considerations probably led him to see law as a generalization assimilable to ethical or moral principles. Furthermore, his belief that law should promote stability in the practical affairs of life led him to the belief that significant generalizations offered the only escape from a chaotic “succession of particulars”. Finally, in generalization and a moderate amount of rigidification of rules he found economy of effort; the judge or the lawyer cannot reexamine the whole body of particulars every time a question of law arises. Thus, the values of stability and economy lead to the recognition of law as a generalization, a normative proposition. A discussion of his theory of values is given further on.⁴⁹

3. *The opinion of the court as an expression of law.* Cardozo definitely rejects the view that law is *merely* what courts do in fact. Indeed, he is so sure of this position that he refuses to ascribe to the neo-realists a thorough-going adherence to this position:⁵⁰

“I am persuaded . . . that there has been no thought to preach a doctrine of undisciplined surrender to the cardiac promptings of the moment, the visceral reactions of one judge or another.”⁵¹

What he objects to is not that the opinion of the court be regarded as a tentative or a fallible generalization, but that it be regarded

49. See Part II of this article.

50. “None of them (the neo-realists) would be willing to say that the professed reasons are of no importance.” 55 REPORTS 292. In support of this he points out that behavioristic psychology, which he regards as the basis of the “Do-law” theory, regards speech as significant conduct and thinking as sub-vocal speech. *Ibid.* This ignores the theory of post-rationalization, which is more directly responsible for the belittling of the judicial opinion. Elsewhere Cardozo refers to the Freudian theory of the subconscious (*id.* at 272) and to the subconscious loyalties of the judge. *THE NATURE* at 167-175.

51. 55 REPORTS at 273.

as a mere ritual or a pseudo-explanation of the genuine motivations for the decision. He finds value in depriving the judicial opinion of some of its sanctity, for thereby the doctrine of *stare decisis* is made less rigid.⁵² He is quite ready to concede that the facts of a precedent and the decision given by the court upon those facts may sometimes be taken as expressing more accurately the authoritative status of the precedent, than what is said by the judges in the opinion. Sometimes one and sometimes the other will guide future litigation:

"Wherever we turn, we gather cumulative evidence that it is not merely what was ruled nor merely what was said in explanation of the ruling, but at one time the ruling and another time the explanation, that has the vitalizing capacity to shape the forms of law thereafter."⁵³

He reviews the cases in the New York Court of Appeals on the question of tort liability for negligent (non-fraudulent) misrepresentation. He points out that, despite care in the phrasing of the rule in the earlier opinions, legal propositions stated too broadly had to be qualified in later opinions; they "were confined to the situations of fact which brought them into being".⁵⁴

In this last phrase there is a repetition of the conventional formula for dealing with the inconvenient precedent. Strictly speaking, one cannot "confine" a general rule to the situation of fact in the particular case which gave rise to its utterance. One can deny the correctness of the proposition, and one should then formulate a new one which expresses more accurately the authoritative status, if any, which the precedent is to have in the future. The second step is frequently omitted in the process of distinguishing inconvenient precedents, with the practical result that court and counsel are obliged to sail around an island whose boundaries are befogged. Cardozo, by his careful phrasing of his generalizations, did much to obviate the necessity for tacit overruling, but he had too much respect for his predecessors in office to try to set them straight.

Cardozo did not develop a theory of judicial precedents. That is, he did not ask the general question, what generalizations can be derived from a precedent or a series of precedents? He recognizes that the exclusion of *dicta* requires separation of the accidental and non-essential from the essential and inherent. But he assumes too readily that this has been done and that "*the principle, latent within it [the precedent] has been skillfully extracted and accurately stated*".⁵⁵ Then begins

52. *Id.* at 269-270. Cardozo's defense of the judicial opinion subsequently found support in ROBINSON, *LAW AND THE LAWYERS* (1935) c. VIII.

53. 55 REPORTS at 275.

54. *Id.* at 280.

55. THE NATURE at 30.

the judicial process of determining the tendencies of development and growth of this principle. The vulnerable point of his position is the assumption that a case has only *one* principle; it overlooks the simple proposition of logic that from any combination of facts (particulars) as complex as those of a reported judicial decision, an indefinite number of generalizations can be drawn, each of which will serve as a "rule" applied to these facts (some of them) and leading to the same conclusion. This aspect of judicial precedents, frequently pointed out in recent years,⁵⁶ was not touched upon by Cardozo. He was not technically expert in logic; and he preferred to grasp the essence of a precedent and shape it to his needs rather than to articulate the choice of the exact major premises of his reasonings.

Cardozo's bar association address of 1932 attempted a reconciliation between his own views and those of some of the "neo-realists" (to use his own phrase, originated by Pound). Professor Llewellyn's article of 1931⁵⁷ had warned Cardozo not to impute to this group all of the views which had been ascribed to it, and particularly not to say that all the "neo-realists" would discard rules of law. On this basis Cardozo effected a partial reconciliation. Yet the differences which remain between Cardozo and such writers as Oliphant are none the less important because they are differences in practical emphasis rather than in abstract theory. Rigorous analysis of a precedent as embodied in facts and decision, coupled with a skeptical attitude toward all broad generalizations in the opinion of the court, leads to the view that a precedent furnishes authoritative support only for a narrow rule of law. The "neo-realists", as Llewellyn points out,⁵⁸ have been chiefly interested in the study of narrow areas of law. Cardozo, on the other hand, accepted more readily the broad generalizations of the court's opinion, and found in sets of precedents those broad generalizations which he deemed necessary to bring stability into the legal order, to fill the gaps between isolated judgments. Rather than in terms of nominalist versus realist, the current controversies about the theories of precedents can better be stated as a controversy between broad-rule theorists and narrow-rule theorists.

The difference may be otherwise expressed. Those who favor the "narrow-rule" theory are concerned that the propositions of (or about) law should have two characteristics: they should refer in terms to the operative facts (facts susceptible of proof in court) to which legal

56. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* (1933) 33-35, 222-223; Goodhart, *Determination of Ratio Decidendi of a Case* (1930) 40 *YALE L. J.* 161; Oliphant, *A Return to Stare Decisis* (1928) 14 *A. B. A. J.* 71, 72-73.

57. Llewellyn, *Some Realism about Realism—Responding to Dean Pound* (1931) 44 *HARV. L. REV.* 1222.

58. *Id.* at 1237.

consequences will attach; and secondly, they should indicate the precise legal consequences of those facts. This position is, it is submitted, implicit in Holmes' prediction theory of law,⁵⁹ in Hohfeld's proposals for exact terminology,⁶⁰ in Green's subdivision of torts into fact-categories,⁶¹ in Llewellyn's application of Occam's razor to eliminate the concept of "right" from the "interest-right-remedy" analysis⁶²—to mention only a few examples.⁶³ The "narrow-rule" theory ordinarily leads to the belief that the unsettled areas of litigation are quite extensive, sometimes that judicial hunches play a large part in the decision of cases, frequently to the subordination of a theory of values in the decision of cases, and sometimes to a particular writer's belief that he can formulate a better generalization for the unsettled areas of law than the courts have done. A distrust of broad generalizations, is, at all events, characteristic of those who adhere to this position. Cardozo, on the other hand, sought the guidance of inspiration rather than of exact reference in broad generalizations. He found the unsettled areas of the law to be relatively small,⁶⁴ and he deemed a judgment on relative values to be of the essence of judging in the novel or "unprovided" case.⁶⁵ He had faith in legal rules and principles as guides to the decision of cases, and, excluding obvious *dicta*, he took the rules and principles of the courts' opinion as, at least presumptively, expressing the authoritative doctrine of a precedent.

4. *A law as a prediction or as a norm?* Cardozo rejected the view, attributed to Gray and W. Jethro Brown⁶⁶ that "real" law is not found anywhere except in the decision of a court, that past decisions are not law because the court may overrule them, and even "present" decisions are law only for the parties litigant.⁶⁷ Cardozo's arguments against this position are not in terms of an attack upon nominalism, but they are the kind of practical arguments to which

59. See *supra* p. 76.

60. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 YALE L. J. 16, (1917) 26 YALE L. J. 710. See also Corbin, *Legal Analysis and Terminology* (1919) 29 YALE L. J. 163.

61. GREEN, *THE JUDICIAL PROCESS IN TORT CASES* (2d ed. 1939).

62. Llewellyn, *A Realistic Jurisprudence—The Next Step* (1930) 30 COL. L. REV. 431, especially p. 443 *et seq.*

63. Professor Llewellyn, in his documentary summary of the "neo-realist" positions, asserts that narrow-category treatment is characteristic of the neo-realists. Llewellyn, *supra* note 57, at 1237, and Appendix I.

64. Nine out of ten cases which come before a court, he said, were predestined to be decided in a certain way. *THE GROWTH* at 60.

65. See the discussion of the four methods of the judicial process in Part II of this article.

66. Whether Gray's position is thus fairly represented is a question which is beyond the scope of this paper. He clearly states that judicial precedents and statutes are only *sources* of law. GRAY, *THE NATURE AND SOURCES OF THE LAW* (2d ed. 1921) 123-125. To Cardozo this seemed at best a clumsy circumlocution; the law which men follow in their daily affairs is thus only an *ignis fatuus*. *THE NATURE* at 127; *THE GROWTH* at 31.

67. *THE NATURE* at 126.

nominalism is vulnerable. The position, he says, which denies the possibility of "rules of general operation", denies the possibility of law, since it turns into illusions and myths "the great and unquestioned phenomena of society", that men yield obedience to law, that obedience is the rule and litigation the exception.⁶⁸ A law, or a rule of law, has a status in advance of its application in litigation. The minimum status of a legal rule derived from precedents is that a court of the same jurisdiction *may* apply it to a later controversy without a violation of judicial duty. It may supply the guidance to a decision on "new" facts; yet it may be rejected as inapplicable (irrelevant) because some other rule or principle is chosen by the court in the exercise of the judicial function. The maximum status of a legal rule is that it will probably be accepted as authoritative by the court when "new" situations arise in litigation. The clearest statement of the prediction theory, as outlined by Cardozo, is the following:

"A principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged, is, then, for the purpose of our study, a principle or rule of law."⁶⁹

In this and several other passages Cardozo is more concerned with establishing the status of rules of law as propositions which are merely probable rather than absolutely certain, than in formulating an exact statement of the prediction theory of law. He relies upon Keynes' theory of probability,⁷⁰ and upon Dewey's position that the

68. *Id.* at 127-128. See also 55 REPORTS at 276.

69. THE GROWTH at 52. See also 55 REPORTS at 276, 282. In an earlier passage he says: "When there is such a degree of *probability* as to lead to a reasonable assurance that a given conclusion ought to be and will be embodied in a judgment, we speak of the conclusion as law. . . ." THE GROWTH at 33 (italics supplied). It seems clear that Cardozo conceived of rules or doctrines of law as having a probability status, and yet that he did not have an exact conception of probability. His casual references to Keynes, *A Treatise on Probability*, THE GROWTH at 68, 69, and to probability in the natural sciences, 55 REPORTS at 283, indicate no choice as between the various meanings of probability. It seems scarcely possible that he considered the frequency theory or mathematical theory of probability applicable to legal propositions based upon precedents, since the small number of precedents on a given proposition and especially their qualitative diversity makes a rigorous calculus of probabilities inappropriate. The logical theory of Keynes, that probability is a relation between a proposition stating the basis of prediction and the proposition predicted, seems more appropriate in the Cardozo context, since the inference of probability is drawn by lawyers and judges from a definite body of authoritative decisions, which are marshalled in briefs and opinions. On the whole, however, it seems likely that Cardozo took probability to mean no more than the amount of certainty associated with belief, the degree of confirmation. This meaning is, as is pointed out in the next paragraph above, adequate for the significance which Cardozo attaches to probability. For an illuminating analysis of these meanings of probability, see Nagel, *Principles of the Theory of Probability* (1939) INTERNAT'L ENCYC. OF UNIFIED SCIENCE, Vol. I, No. 6, especially pp. 17, 44, 48, 60. Cardozo's indeterminate reference to "probability" was indirectly criticized in Adler, *Law and the Modern Mind* (1931) 31 COL. L. REV. 101: "Frank and Cardozo and Wurzel make empty references to the logic of probability as the logic of the law. They are partially correct, but they show no understanding of the nature of this logic of probability."

70. THE GROWTH at 68-69.

laws of physics are no more than predictions⁷¹ to support his contention that between the chaos of formless flux and the absolute certitude of immutable rules one can find a middle ground which is solid enough to sustain the orderly processes of society. This middle ground is the realm of probability.

The prediction of judicial decisions ("what the courts will do in fact", said Holmes) is not precisely what Cardozo is talking about.⁷² The prediction of the decision of a given court on given facts involves a consideration of other factors besides the rule of law. It may involve those "visceral reactions of the moment" which Cardozo refused to consider as a part of law, and which, in his view, as mere eccentricities of judges tend to balance each other in the deliberations of an appellate court.⁷³ As far as one can tell, Cardozo was primarily if not wholly concerned with the decisions of appellate courts, the work with which he was most familiar, and with the use of rules or principles in shaping such decisions. To say, as in the passage above quoted,⁷⁴ that the rule "will be enforced by the courts if its authority be challenged" is not to say that the rule will be applied so as to give judgment for the plaintiff (or defendant) on a given set of facts. For the facts (i. e., the facts as seen by the court, what Professor Llewellyn calls "the artifacts") may not be such as to challenge the alleged rule; the alleged rule may be irrelevant. Elsewhere he has told us that the cases "where the controversy turns not upon the rule of law, but upon its application to the facts", have been thrown in the background, although they make up "the bulk of the business of the courts".⁷⁵ He is interested in the growth of the law as embodied in legal rules, and these cases (of controversy over application of the rule) "leave jurisprudence where it stood before."⁷⁶ Cardozo was not primarily concerned with the work of the counselor writing a letter to his client and telling him how to keep out of the law's clutches. Elsewhere he indicates that he is ready to sacrifice the technician's accuracy of prediction for the adaptation of legal doctrines to their changing social concomitants. Yet the prediction theory mediates between stability and change, giving law a stability of the same kind and about the same degree possessed by other kinds of predictions which guide the practical affairs of life. For Cardozo, then, the prediction theory of law

71. See 55 REPORTS 283.

72. It is true that in another passage he speaks of predicting "a given conclusion", but it appears from the context that the "conclusion" is itself a rule of law. *THE GROWTH* at 33-34.

73. *THE NATURE* at 177.

74. *Supra* p. 85.

75. *THE NATURE* at 163.

76. *Ibid.* The statement is hyperbolic, since any application of a legal doctrine gives it at least a tiny increment of meaning, and thus affects, at least infinitesimally, its systemic relations to other legal doctrines.

has two kinds of significance. Metaphysical, in that it serves to assign to rules or principles of law their metaphysical status in the social cosmos; and ethical (axiological or deontological), in that it affords a method of compromise between two major social values, the value of stability or orderliness, and the value of adaptation to social change.⁷⁷

The prediction theory of law has sometimes been criticized as mechanistic, as ignoring the essential quality of law, that it expresses or embodies judgments of value. If the foregoing thesis is correct, it cannot be said that Cardozo's prediction theory is open to this charge. Nor can it be said that his prediction theory is incompatible with the conception that a rule or principle of law is a norm. A proposition of law is a norm in that it tells people (officials or private citizens, or both) what they should or shall do under circumstances conceptually indicated; in its most rigorous and exact formulation it asserts that combinations of fact, conceptually indicated, imply legal consequences (official conduct), conceptually indicated. The *authoritative* acceptance of the proposition makes it mean authoritative command or prescription. The prediction theory of Cardozo asserts that the future authoritative acceptance of a proposition of law may be inferred, with greater or less probability, from known precedents and other facts. ("Other facts", for Cardozo would not include the "cardiac promptings of the moment" but would include the *mores* of the community and current conceptions of public policy.) The prediction theory is thus not incompatible with the normative theory.⁷⁸

5. *The judge as the center of legal theory.* Cardozo in his theories of law continues the American view, first emphasized by Holmes, that the judge is the center of the juristic universe. The analysis of law, its meaning, its social effects, its history, its rightness or wrongness, begins with the judge and centers around a theory of judicial decisions. Viewed in the long line of theories about law and justice from Plato to the present this approach is so distinctive as to deserve a name. We may call it the judicentric approach. It developed from the common law as a body of law based upon judicial precedents, from the preoccupation of the American bar with the work of the counselor, from the case method of instruction in legal education, and from the attitude of the American people toward judicial independence and

77. The thesis here presented is sustained by references given under other headings in Part II: "His Theory of Values"; "His Metaphysical Theories". By "social change" is not meant merely physical changes, but also changes in habits, attitudes and ideas.

78. In one passage he combines the notions of prediction and oughtness, thus indicating that to him the distinction was of slight importance: "Where there is such a degree of probability as to lead to a reasonable assurance that a given conclusion *ought to be and will be* embodied in a judgment, we speak of the conclusion as law, though the judgment has not been rendered, and though, conceivably, when rendered, it may disappoint our expectation." *THE GROWTH* at 33-34. (Italics supplied.)

judicial supremacy. It leaves theories of justice and of the state to political scientists, political economists and philosophers, and concentrates upon that "lawyer's law" which moves within the narrow range of choice (of values) which is within the limits of the judicial function. As a device for the division of labor, it has the merits of specialization in function and has produced a body of technical analysis which is probably unrivalled in variety and detail. The judicentric approach is partly responsible for that submerging of considerations of value in discussions of legal (especially common law) doctrine which is apparent in many of our leading legal treatises. It is a great merit of Cardozo's contributions to jurisprudence that he, along with Pound, Holmes (in his more idealistic moments) and others, has brought considerations of value into the periphery of the judicentric theory, and has even startled his more staid colleagues by pointing out the choices of values which are compatible with the limits of the judicial function. Yet Cardozo did not escape the limitations of the judicentric approach. He showed little interest in theories of the state or in the relation between the state and society,⁷⁹ and his theory of the judicial process suffers accordingly. Similarly, he shared at times the judicentric attitude toward legislation, the view that statutes are mere interlopers, temporary expedients devoid of principle except where the courts, by reason of their power of judicial review, have infused them with the glow of principle.⁸⁰ However, it is only fair to say that he did not consistently deprecate the importance of legislation and that he apparently recognized that such statutes as workmen's compensation acts embody humanitarian principles and respond to permanent and profound social needs.⁸¹ Perhaps these limitations, like his failure to discuss administrative tribunals, were due to his genuine intellectual humility. He spoke on the things he knew most about.

6. *The law as a system.* As a result of this approach to law, Cardozo conceived of the body of law as a set of propositions built up from judicial decisions rather than as a set deduced from higher and more inclusive generalizations which were derived *a priori*. He said:

"The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from

79. See, for example, how he gently puts aside Duguit's theory of "*droit objectif*". *THE GROWTH* at 19. (I take no account here of his Supreme Court opinions.)

80. "Statutes are designed to meet the fugitive exigencies of the hour." *THE NATURE* at 83. The power of judicial review ". . . tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle. . . ." *THE NATURE* at 93.

81. See, for example, his discussion of *Ives v. South Buffalo Ry.*, 201 N. Y. 271 (1911), and of the competing values involved in judicial review of such legislation. *THE GROWTH* at 71-74.

them deductively. Its method is inductive, and it draws its generalizations from particulars."⁸²

Judicial precedents are the basic "particulars". A hierarchy of generalizations, of increasing scope of generality, ranges above them; but it is, unlike Kelsen's hierarchy of delegated authority,⁸³ a hierarchy of decreasing authority.⁸⁴ The more inclusive the scope of the generalization, the less is its predictive value, its utility as a norm which the courts will enforce. One can predict more accurately in terms of narrow rules than in terms of general principles, for the former are less equivocal and must be obeyed. He recognizes that there are gaps in the law,⁸⁵ which it is the task of the judiciary to fill in. These gaps are areas in which prediction is too uncertain to attain the status of law. Now the literature of the law contains enough broad generalizations (*sic utere tuo, suum cuique tribuere, etc.*) to fill in any gap by a process of formal logic. If our interpretation is right, Cardozo's position expresses a distrust of deduction from such broad generalizations, a recognition that they conflict with others having equal validity, and a recognition that the legal "system" is pluralistic. Yet it must be noted that he yearned, and strove, for deeper generalizations beneath the flux and welter of particulars, and that from first to last he exalted the man of wisdom above the man with the card index of cases.⁸⁶ He recognized, likewise, the "generative force" of precedents, without saying that this means the deductive use of generalizations derived from precedents. He conceived of the legal system in terms of process rather than in terms of formal logic. In this he was a leader of American legal realism.

Cardozo never elaborated his theory that the law is inductive and systematic. He exemplified it, fragmentarily, in many of his judicial opinions, which are systematic expositions of a particular field of doctrine.⁸⁷ His talent for systematic exposition was one of the qualities that made him a great judge. His ardor for the ethical principles beneath legal rules, for the more inclusive generalizations, could not be assuaged by the conventional formulas of treatise, digest or encyclopedia. He regarded these principles as inductive generalizations

82. *THE NATURE* at 22-23; see also *THE PARADOXES* at 36.

83. See *supra* note 33.

84. "I doubt whether these types or patterns [higher and broader revelations of a social order, norms of right and justice] except to the extent that they are consistent with statute or decision, should receive the name of law. . . ." *THE GROWTH* at 47-48. See also *THE NATURE* at 19-20.

85. *THE NATURE* at 14.

86. *Id.* at 21.

87. E. g., *Palsgraf v. Long Island R. R.*, 248 N. Y. 339, 162 N. E. 99 (1928), and *Meinhard v. Salmon*, 249 N. Y. 458, 164 N. E. 545 (1928), both reprinted in *LEVY, CARDOZO AND FRONTIERS OF LEGAL THINKING* (1938) 124, 168 respectively.

perceived by the divining eye in the welter of particulars. Whether the divining eye is more important in the process than the particulars is a question about which philosophers may interminably dispute. In the language of Professor John Dewey, whom he frequently cited with admiration,⁸⁸ the judicial process involves a series of imagined experimentations, in terms of operations (facts implying legal consequences) which must be "compossible" with the principles of the legal system.⁸⁹ Cardozo's frequent reference to the analogy of the physical sciences,⁹⁰ indicates that the systemic process of the law is analogous to the development of system in those sciences. The analogy is not elaborated by Cardozo, but one can extrapolate from the accounts of induction within a system⁹¹ an analogous process by which Cardozo, and many another judge, tests the myriad of possible inductions from precedent and selects the one having the highest status of authoritative recognition. Whatever the process may be, it is clear that Cardozo's concern with legal architectonics was a part of his concern with the values of stability and orderly change.

7. *The status of "natural law."* "The law of nature" has had various meanings in the course of its long history, and to rigorous semanticists (e. g., Bentham) it has appeared to have no meaning other than the expression of individual desires or prejudices. In its somewhat decadent form it advances universal and eternal principles of justice to which positive law ought, and must in the long run, conform.⁹² Cardozo rejects this conception of natural law:

"The law of nature is no longer conceived of as something static and eternal. It does not override human or positive law. It is the stuff out of which human or positive law is to be woven, when other sources fail."⁹³

In what sense is natural law "the stuff" out of which positive law is "woven"? To Cardozo, it seems, this meant that in dealing with the unprovided case (the one not clearly determined by positive legal rule),

88. See 55 REPORTS at 283; index of THE PARADOXES.

89. DEWEY, THE QUEST FOR CERTAINTY (1929) 160.

90. THE GROWTH at 34; 55 REPORTS 282.

91. The general account of induction within a system (that is, the building up by induction of propositions more or less systematically interrelated) in EATON, GENERAL LOGIC (1931) 66-70, is highly suggestive of the process of developing generalizations within a body of case law. So also is the account of similar procedures in physics, in CARMICHAEL, THE LOGIC OF DISCOVERY (1930) c. IV.

92. This phase of natural law theory is represented in LORIMER, THE INSTITUTES OF LAW (2d ed. 1880) 212-248, reprinted in HALL, READINGS IN JURISPRUDENCE (1938) 79-81.

93. THE NATURE at 132. The sentence preceding the quotation states that ". . . the old theory survives in little more than name." See also *id.* at 142; THE GROWTH at 47.

the judge must be motivated to attain justice, must fall back on his intuitive notions of rightness and wrongness, and must test or correct his intuitions by the community standards, the *mores*. Attempts to formulate natural law in formal propositions seemed to him doomed to failure; he found Stammmler's systematic elaboration of the principles of just law to be of but little help to the harassed judge.⁹⁴

It is true that there are passages in Cardozo's writings which might be used to support the argument for natural law. A philosopher's ideas are not to be tested solely by his express disavowals. In some passages he reveals a striving for the Platonic essence of law, the reality beneath the flux.⁹⁵ He sees in law "the expression of a principle of order to which men must conform in their conduct and relations as members of society, if friction and waste are to be avoided among the units of the aggregate, the atoms of the mass".⁹⁶ Yet this hypothetical imperative, this imperative relative to ends, is not the absolute or categorical imperative of natural law theory as commonly understood. Any one who compares Cardozo's writings with the leading writers on natural law can hardly fail to note the radical difference in approach. At most natural law was to him the stuff of inspiring generality.*

[To be concluded.]

94. THE PARADOXES at 35.

95. See discussion *infra* Part II: "HIS METAPHYSICAL CONCEPTIONS."

96. THE GROWTH at 140-141, citing POUND, CRIMINAL JUSTICE IN CLEVELAND (1922) 563-564.

* The remaining installment of this article will discuss: "His Conception of the Judicial Function" "His Four Methods of the Judicial Process"; "His Theories of Values"; "His Metaphysical Conceptions".